Vol. 90

OP.IoV

51662

MAURICE FOERKERT, GABE BURTON, JOHN KAHLERT & THE OLD TOWN TRIANGLE ASSOCIATION,	)	
Plaintiffs-Appellants,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY
vs.	)	
BOARD OF ZONING APPEALS OF THE CITY OF CHICAGO, B. EMMET HARTNETT, EARL J. McMAHON, KARL VITZUM, HUBERT MESSE, EXCHANGE NATIONAL BANK AS TRUSTEE UNDER TRUST #14631, & RAYMOND F. KLEIN,	)	
Defendants-Appellees.	)	

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

Plaintiffs, as adjacent landowners, prosecute this appeal under the Administrative Review Act of Illinois from an order of the Circuit Court upholding the decision of the Zoning Board of Appeals which granted a variation. Prior to allowing the variation the Board held public hearings at which it heard the testimony of witnesses and arguments of counsel presented by the objecting landowners and by the defendant owners who were seeking the variation. Various exhibits were also presented for the consideration of the Board. No questions are raised on the pleadings.

The premises which are the subject of the appeal, 1842-46 North Lincoln Park West, are located on a lot sixty feet wide and one hundred twenty-five feet deep in a R-5 General Residence District. The premises are improved with a three-story apartment building which contains nine apartments. The building is accompanied by six parking spaces. The apartment building has been remodeled by the present owners at an expense of from sixty to seventy thousand dollars; three old garage structures at the rear of the building were not remodeled and it is this area which is the subject of the disputed variance.

Under a land trust, defendant, Exchange National Bank, was trustee and legal owner and defendant, Raymond F. Klein, was the primary beneficial owner. The record reveals that the owners first applied to the Department of Buildings for a permit to construct three additional apartments in the rear of the existing structure. On June 18, 1963, the Zoning Administrator of the City of Chicago refused to issue a permit for the proposed addition because the improvement would not conform with the requirements of the zoning ordinance. The owners next filed an application before the defendant, Board of Zoning Appeals on July 2, 1963, seeking a variation of the zoning ordinance which required a thirty foot rear yard space in the area where the proposed addition would be built. The plaintiffs' sole contention on appeal is that the evidence did not support the decision of the Board to grant the variation requested; and, therefore, the decision of the board was against the manifest weight of the evidence and should not have been upheld by the Circuit Court.

Both the Illinois Revised Statutes, Chapter 24, Article 11-13-4, and the Chicago Zoning Ordinance, Article 11-7-3 provide that variations shall not be granted unless the evidence presented to the Board sustains the following three conditions:

> 1. The property in question cannot yield a reasonable return if permitted to be used only under the conditions allowed by the regulations in the district in which it is located.
>
> 2. The plight of the owner is due to unique circumstances.

3. The variation if granted will not alter the essential character of the locality.

Article 11.7-3 of the Chicago Zoning Ordinance provides in addition that,

> For the purpose of implementing the above rules, the Board shall also, in making its determination whether there are practical difficulties or particular hardships, take into consideration the extent to which the following facts favorable to the applicant have been established by the evidence.

(1) The particular physical surroundings, shape , or topographical condition of the specific property involved would result in a particular hardship upon the owner as distinguished from a mere inconvenience, if the strict letter of the regulations were carried out;

(2) The conditions upon which the petition for a variation is based would not be applicable, generally, to other property within the same zoning classification;

(3) The purpose of the variation is not based exclusively upon a desire to make more money out of the property;

(4) The alleged difficulty or hardship has not been created by any person presently having an interest in the property;

(5) The granting of the variation will not be detrimental to the public welfare or injurious to other property or improvements in the neighborhood in which the property is located; and

(6) The proposed variation will not impair an adequate supply of light and air to adjacent property, or substantially increase the congestion in the public streets, or increase the danger of fire, or endanger the public safety, or substantially diminish or impair property values within the neighborhood.

"The findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct." Ill. Rev. Stat. 1965, ch. 110 §274.

This section has led to the development of the rule that the decision of an administrative agency cannot be overturned on appeal unless it is against the manifest weight of the evidence. Parker v. Dept. of Registration and Education, 5 Ill. 2d 288, 125 N.E.2d 494. Of course, the applicant for a zoning variation must comply with the proof requirements of the statute. River Forest Bank & Trust Co. v. Zoning Board, 34 Ill. App. 2d 412, 181 N.E.2d 1; LaSalle Nat. Bank v. County of Cook, 12 Ill. 2d 40, 145 N.E.2d 65. In reviewing the decision of the Board in the instant case our rule is to determine whether or not substantial evidence of probative value was introduced at the hearing to support the decision of the Board to grant the variation.

Because the plaintiffs argue that the defendant owners have not introduced sufficient evidence to prove any of the three statutory requirements involved in a variation proceeding, we shall deal with each requirement separately, and with the proof adduced at the hearing to support it. As to the requirement that the property cannot yield a "reasonable return" if it is used only in conformance with the existing zoning requirements, defendant owners introduced evidence that when the present owner acquired the building on the premises it was a three-story rooming house and that it was then converted into a nine-flat building at a cost of over $60,000.00. The building at the present time contains six off-street parking units. The proposed structure would occupy the space now used by three dilapidated garages, and a total of eleven off-street parking spaces will be provided for. We believe that from this evidence a fair inference could be drawn that the property could not yield a reasonable return without the variation.

As to the requirement that "the plight of the owner is due to unique circumstances" we note that the Board had the benefit of its own visual inspection of the property and the neighborhood, and was impressed with the plight of the owners in an urban renewal area. There was testimony that 30 to 40 percent of the buildings in the area had coach houses closer to the alley than thirty feet; indeed, the building immediately adjacent to the property in question has a coach house less than one foot from the back alley. From the foregoing evidentiary facts the Board could reasonably have inferred that the plight of the owners was unique.

The final requirement listed by the statute that the applicant must prove to entitle him to his variation is that the variation "will not alter the essential character of the locality." Seymour Weiner, a registered architect, testified that the proposed addition would be in keeping with the rest of the area. He also testified that he, as the architect for the proposed addition, was "...not trying to change the whole area." Pat Malone, a zoning consultant, testified that "...the entire program would fit in with the Old Town neighborhood there." He also testified that in his opinion the proposed variation would not impair the supply of light and air to the adjacent property. We might also point out that the Appeals Board informed the objectors that the proposed new addition would contain floor space well within the maximum permitted under the zoning law. We feel that sufficient evidence was introduced so that the Board might reasonably conclude that the proposed addition would not cause a change in the "essential character of the locality."

Sufficient evidence was introduced at the hearing before the Zoning Board of Appeals to comply with the statutory standards of proof enunciated in the state statute and in the Chicago ordinance. We cannot say, as we must to reverse, that the findings and conclusions of the Board in granting the variation, and the judgment of the Circuit Court in affirming that decision, were manifestly against the weight of the evidence.

While the City agrees that the court properly affirmed the decision of the Board, it nevertheless correctly points out that the property owners in their brief seem to have misconstrued the decision of the Board of Appeals. The Board decided that a permit would be granted to erect a two-story brick three-apartment addition to the existing building. In their brief the property owners erroneously refer to four apartments and to the fact that the buildings"...would be connected by a canope." The use of a canopy would result in a detached building, which is defined in Article 3, Section 3.2 of the Chicago ordinance as a structure which is entirely surrounded by open space on the same lot. We construe the decision of the Board to be that the authorized addition must be joined to the present structure by a party wall or walls. The Board also decided that as a condition for allowing the variation eleven off-street parking spaces should be provided, and that all applicable ordinances should be complied with.

Accordingly the judgment of the Circuit Court is affirmed in accordance with the views herein expressed.

AFFIRMED.

MURPHY, P. J. and

ADESKO, J. concur.

(Abstract only)

A

51594

JAMES SHROUT, d/b/a THE SHROUT AGENCY, Plaintiff-Appellant,	)	APPEAL FROM THE
vs.	)	CIRCUIT COURT OF
McDONALD'S SYSTEM, INC., an Illinois corporation, and RAY KROC, Defendants-Appellees.	)	COOK COUNTY.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

James Shrout, doing business as The Shrout Agency, filed an amended complaint consisting of three counts against McDonald's System, Inc., and Ray Kroc, president of McDonald's, demanding damages in the sum of $800,000 on a quantum meruit theory against McDonald's alone, in the sum of $45,000 on an inducement to a breach of contract theory against McDonald's alone, and of $1,661,000 on the theory of a conspiracy to interfere with contractual and other property rights against both McDonald's and Kroc. Defendants' motion to dismiss the amended complaint was allowed, and plaintiff appeals.

Count I of the amended complaint alleged that plaintiff and McDonald's entered into an oral agreement in May, 1957 whereby plaintiff agreed to provide advertising services for McDonald's in return for a "reasonable compensation." It was further alleged that plaintiff performed these services but was not reasonably compensated therefor. On June 12, 1961, the parties canceled the oral agreement and entered into a written agreement containing the following language:

> "The parties hereto agree to enter the present agreement and hereby revoke and cancel all previous agreements, contracts and commitments relating to the advertising and promotion programs heretofore entered into by said parties...."

On September 1, 1961, McDonald's gave notice to plaintiff that the second contract would be terminated as of December 31, 1961.

Count II alleged that as advertising agent for McDonald's plaintiff procured the services of National Advertising Company, also known as Nadco, to furnish highway advertising for the holders of McDonald's franchises. In April, 1960 Nadco and McDonald's entered into an agreement in which Nadco recognized plaintiff as the advertising agent of McDonald's and agreed to pay plaintiff 15% of all monies received by it for its services as a commission. The count further alleged that in December, 1961, McDonald's directed Nadco to cease payments of the commissions to plaintiff, thereby interfering with plaintiff's contractual rights.

Count III alleged that on or about June 12, 1961, and for some time prior thereto, defendant Kroc, individually and as president of McDonald's, engaged in a course of conduct with McDonald's designed to deprive plaintiff of receipt of a reasonable compensation for his services as advertising agent of McDonald's.

Defendants' motion to dismiss the amended complaint was accompanied by affidavits and exhibits which revealed the following:

Pursuant to the oral contract of May, 1957, plaintiff performed the services required thereunder for which he periodically received from McDonald's compensation amounting to a total of $38,801.88; plaintiff cashed all payment checks and at no time protested the amounts of money he received. For some time prior to June, 1961, plaintiff failed to make payments to suppliers of merchandise and to the media which advertised McDonald's products for their services and merchandise as he was required to do, and a written agreement was entered between plaintiff and McDonald's on June 12, 1961, terminating the oral agreement of May, 1957, and requiring plaintiff to

furnish advertising services for an agreed compensation. From June 12, 1961, until December 31, 1961, when, as permitted under the contract, McDonald's terminated the contract, plaintiff rendered services as agreed in the written contract and submitted invoices in the amount of $25,431.65 for these services, which invoices were paid by McDonald's.

Before it terminated plaintiff's contract on December 31, 1961, McDonald's notified Nadco, on December 28, 1961, to cease all commission payments to plaintiff. Pursuant to this direction Nadco ceased the payments and plaintiff instituted legal action against it to recover certain commissions. Plaintiff thereafter received a consent judgment against Nadco in the amount of $11,000 and in return gave Nadco a general release from liability for further payments. The parties to the instant action subsequently filed a stipulation below to the effect that plaintiff herein was not demanding and was not entitled to actual damages against McDonald's under Count II and that it was seeking only punitive damages thereunder.

Plaintiff maintains that the contract of June 12, 1961, does not bar his claims set out in the amended complaint which alleges valid causes of action in quantum meruit, inducement to breach of contract, and conspiracy to deprive plaintiff of his reasonable compensation as advertising agent of McDonald's.

1 Plaintiff's claim under Count I is barred by the contract of June 12, 1961, which expressly states that the parties thereto revoke and cancel "all previous agreements, contracts and commitments relating to the advertising and promotion programs" theretofore entered between the parties. The contention that an action in quantum meruit is "an action off the contract and not on the contract" is unavailing inasmuch as there did in fact exist between the parties a fully executed, express contract. See Goodman v. Motor Products Corp., 22 Ill. App. 2d 378, 384-385. 161 NE 2d 31

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Plaintiff is further barred from recovery under this count for the reason that the dealings between plaintiff and McDonald's under the oral contract resulted in an account stated between the parties which plaintiff is now estopped to deny. Throughout the term of the oral contract plaintiff was periodically compensated by McDonald's for his services as advertising agent. The monies paid by McDonald's were accepted by plaintiff without question or protest. It was not until some two and one-half years after the oral agreement was terminated that plaintiff determined he was entitled to more compensation under the oral contract than he had in fact received and accepted without contest. (See 1 C.J.S. Account Stated § 1 et seq.)

The cases cited by plaintiff in support of his position that an action in quantum meruit may be maintained under these circumstances are inapposite on their facts. The parties complaining in those cases received either none or only part of the compensation called for under the original contract before it was altered or abandoned. Here, however, plaintiff seeks additional compensation although the oral contract called for "reasonable compensation" and plaintiff did not object to the amounts when received. See for example Huehl v. Monarch Refrigerating Co., 157 Ill. App. 145; United States v. Traylor Bros., Inc., 133 F. Supp. 104; Fargo Glass & Paint Co. v. Globe American Corp., 161 Fed. 2d 811.

Plaintiff's second contention is that McDonald's was guilty of malicious interference with his contractual rights in giving notice to Nadco to cease commission payments to him and that for this reason he is entitled to punitive damages from McDonald's. Plaintiff, however, fails to take into consideration that McDonald's gave notice to him that his contract was being terminated as of December 31, 1961, as it had a right to do under the terms of the contract, and that McDonald's accordingly served

notice on Nadco to discontinue commission payments to plaintiff three days before the contract was terminated. Furthermore, plaintiff thereafter filed an action against Nadco and recovered $11,000 in commissions owing to plaintiff. It was stipulated below between the parties hereto that plaintiff was not entitled to actual damages from McDonald's under Count II, but that he was seeking solely punitive damages thereunder. Where actual damages are not recoverable, there can be no award of punitive damages. Reeda v. The Tribune Co., 218 Ill. App. 45; Madison v. Wigal, 18 Ill. App. 2d 564. Assuming arguendo that Count II sounds in tort, as plaintiff maintains, plaintiff's recovery from and release of Nadco bars any recovery from McDonald's. See Koltz v. Jahaaske, 312 Ill. App. 623, 627-628.

Plaintiff cites Northern Ins. Co. of New York v. Doctor, 23 Ill. App. 2d 225, in support of the proposition that McDonald's fraudulently induced Nadco to break its contract with plaintiff. In that case the defendant fraudulently induced a release from the injured party plaintiff for an amount of the loss suffered over and above the amount which plaintiff insurance company's policy of insurance would cover, thereby leaving the latter without subrogation recourse against the principal defendant. Here, however, McDonald's merely informed Nadco that plaintiff's contract was being terminated and that plaintiff was therefore no longer entitled to commissions.

The final point urged is that defendants conspired with each other to deprive plaintiff of his rightful and reasonable compensation as an advertising agent for McDonald's. It is well settled that a corporation can act only through its agents, and consequently there can be no conspiracy between a corporation and its agents. John Deere Co. v. Metzler, 51 Ill. App. 2d 340, 355. None of the cases cited by plaintiff in support of his position

in this regard involve a conspiracy between a principal and its agents.

The acts which plaintiff claims to have been the subject of the conspiracy, namely depriving him of his commissions, amounted to nothing more than the acts of an employer paying plaintiff for services rendered to which no objections were made at the time. A combination to perform an act is not of itself wrongful; the act performed or sought to be performed must be wrongful and thereby lend its character to the combination. An actionable wrong cannot be made out by "vituperous and profuse interpolation of adjectives characterizing the act to be done as wrongfully done." Skolnick v. Nudelman, 71 Ill. App. 2d 424, 428.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS, P.J., and BRYANT, J., concur.

51973

ELIZABETH GILBERTSON, Now Known As ELIZABETH FREY, Plaintiff-Appellant, vs. ELMER G. GILBERTSON, Defendant-Appellee.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff, Elizabeth (Gilbertson) Frey, from the entry of an order by the Circuit Court of Cook County, denying her petition to modify the child custody provisions of the court's previously rendered decree of divorce.

Plaintiff (age 16) and defendant (age 18) were married on February 17, 1962. Plaintiff had, on January 13, 1965, been granted a divorce on the ground of desertion by defendant, Elmer G. Gilbertson, at which time, temporary custody of the parties' only child, Debra, now age 5, had been awarded to the paternal grandparents.

On November 18, 1965, defendant, who had since remarried, petitioned the court and was granted temporary custody of the child, it appearing that the paternal grandparents, because of their advancing years, could no longer properly care for Debra. Further hearings on permanent custody were thereafter continued by the court to a later date. Subsequently, on May 4, 1966, plaintiff filed her instant petition, from the denial of which she takes this appeal.

Only plaintiff testified at the hearing on her petition. She testified to having since remarried to one Warren Frey in January of 1966, the couple residing in their own five room home in Rolling Meadows, Illinois, where a separate room for the child would be provided. She stated that her husband

presently earned $175.00 per week, and that while she was likewise presently employed as a draftsman for an engineering firm, she would terminate her employment, if granted custody, to devote her full time to Debra. Plaintiff admitted to having, prior to the divorce, been hospitalized for 10 1/2 months for a mental illness, since which time (December of 1965), she has not been in need of any psychiatric care.

Plaintiff, accounting for her failure to object to the entrusting of custody in the paternal grandparents, stated that she felt, in so doing, the best interests of Debra would be served. The witness pointed out, that as of the time of the divorce proceedings, she was working full time as a draftsman and residing alone in a 1 1/2 room efficiency apartment. Since the divorce, plaintiff claimed to have fully exercised all of her visitation rights, as well as having worked with young girls by her active participation in Girl Scout functions. She further asserted that defendant failed to exercise his rights of visitation prior to the time that he obtained temporary custody.

On cross-examination, plaintiff admitted to having either thought of or attempted suicide on two occasions, further acknowledging that on one occasion police had been summoned to her home because of a disturbance caused by a phonograph being played in her front yard. Thereafter, plaintiff made specific denials of each of the following questions by counsel for defendant: (1) that she had allowed Debra to sit behind the steering wheel of an automobile or, on occasion, smoke cigarettes; (2) that she drank to excess, attended certain cocktail lounges on Mannheim Road, or had been arrested for drunken driving; (3) that she had hosted numerous late night parties at her home in Rolling Meadows; and (4) that she had occasion to

consult certain named doctors in regard to either her own mental condition, or because of a diaper rash developed by Debra due to her neglect as a mother. Each of the aforesaid questions was met by strenuous objection from counsel for plaintiff, which were overruled.

On redirect examination, plaintiff stated that she and her present husband owed no debts except a mortgage on their home. The witness being then excused, the court conducted a discussion in chambers off the record. Upon the Chancellor's return to the bench, an order was entered denying plaintiff's petition, which order however, made no provision for permanent custody of the child.

There has been a change in the situation that existed at the time the decree was entered in that the paternal grandparents of Debra are no longer available to continue the care and custody of the child.

The divorce decree, having awarded custody of Debra to the paternal grandparents, and it now being recognized that these grandparents are not in a position to further continue this responsibility and each of Debra's parents having sought custody, there is a duty on each of these parents to show that the welfare and best interest of this child will be accomplished by awarding the custody to one or the other. To say that plaintiff failed to sustain her burden, prima facie, her testimony standing alone and unrefuted on the record, we think would be to grossly misapprehend the facts. Defendant argues that the questions put to plaintiff were not prejudicial, they having been offered solely for the purpose of laying a foundation for later impeachment of the witness, which impeachment never materialized because of the premature termination of the case. It would appear that the court below permitted itself to be adversely influenced by the accusations implicit in the questions

posed, to the extent that it erroneously entered a finding for defendant. In this vein, we note that the decree of divorce is totally silent as to any misconduct by plaintiff.

In a custody case, particularly where, as here, the child is one of tender years, the overriding consideration which must control is the welfare and best interests of the child concerned. While the Chancellor has always been afforded considerable latitude in this regard, his determination cannot pass undisturbed, on review, when the record fails to establish that the welfare and best interests of the child were the controlling factors prompting his judgment. Kelleher v. Kelleher, 67 Ill.App.2d 410, 214 N.E.2d 139 (1966). Accordingly, we feel plaintiff was denied a full and fair hearing on her prayer for relief. Such a disposition, we further feel, would recognize defendant's contentions, who by counsel on oral argument expressed a desire for an opportunity to present testimony relevant to the issue of the mother's fitness to have the custody of her child. We note that the court has not ruled on the application of the father for permanent custody of the child.

For the above reasons, the order is reversed and the cause remanded with directions for further proceedings not inconsistent with this opinion.

ORDER REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

BURKE, J., and BRYANT, J., concur.

NO. 67-75

Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

RICHARD T. REHWALD and FRANCES J. REHWALD, Plaintiffs-Appellants, vs. KARL H. SEELANDT, Defendant-Appellee.	)	Appeal from the Circuit Court of the 17th Judicial Circuit, Winnebago County, Illinois.

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT:

The plaintiffs, Richard T. Rehwald and Frances J. Rehwald, appeal from an order of the Circuit Court of the 17th Judicial Circuit, Winnebago County, entered March 2, 1967, that dismissed their amended complaint because it was "not sufficient to maintain the action.."

The original complaint was filed October 11, 1966 and alleged that on August 26, 1964 the plaintiffs were the owners of a certain residence located in the City of Rockford and that on that date they entered into a written agreement whereby that property was leased to the defendant, Karl H. Seelandt. A copy of the lease was attached to the complaint and made a part of it. The lease contained a provision that the tenant maintain the property "in as good condition and repair as the same shall

be upon taking possession thereof, natural wear.....excepted" and also provided that the tenant could decorate or renovate the property but only with the prior written approval of the Rehwalds.

Paragraph 5 of the complaint recited that "after the defendant vacated the premises, the plaintiffs inspected the residence and found that extensive damage had been done to the premises far in excess of ordinary wear and tear.." and enumerated a list of 17 items of alleged damage. Most of the items enumerated were changes to the residence caused by redecoration.

The complaint further alleged that the plaintiffs did not give their prior written approval to the "changes specified in the above paragraph and the defendant is liable to the plaintiffs for the damage done to the residence in excess of ordinary wear and tear." The amounts of alleged damage are not specified but the prayer asks for judgment in the amount of $2000.00.

The complaint was dismissed on November 18, 1966, pursuant to the motion of the defendant that it did not state a cause of action and the plaintiffs were given 10 days to file their amended complaint. On January 12, 1967, an amended complaint was filed that was identical to the original except that it was not verified and it contained a specific reference to that portion of the lease that provided that no decoration or renovation of the property was to be made without the written approval of the owner. The amended complaint was also dismissed and the plaintiffs have elected to appeal from that dismissal.

The plaintiffs admit in their brief that their amended complaint "may be somewhat inartfully drafted and confusing" but argue that it

should be liberally construed in accordance with Section 33 (3) of the Civil Practice Act (Ill. Rev. Stat., Chap. 110, Sec. 33) and cite the case of Olin Mathieson Chem. v. J. J. Wueller & Sons, 72 Ill. App. 2nd 488 (1966) in support of that argument. The court in that case had stated on page 493 as follows:

> "Liberal construction of the Civil Practice Act requires that the sufficiency of a pleading purporting to state a cause of action, or a defense, be determined by whether the pleader can, under the pleading, prove a set of facts in support of his claim, or his defense, which would entitle him to relief. Simply stated, a complaint or counterclaim should not be dismissed for failure to state a cause of action unless it appears that the pleader can prove no set of facts in support of his claim which would entitle him to relief."

However, the admonition of Section 33 in favor of liberal construction of pleadings "with a view to doing substantial justice between the parties" must be tempered with Section 31 that provides that:

> "Neither the names heretofore used to distinguish the different ordinary actions at law, nor any formal requisites heretofore appertaining to the manner of pleading in those actions, respectively, are necessary or appropriate, and there shall be no distinctions respecting the manner of pleading between actions at law and suits in equity, other than those specified in this Act and the rules. This section does not affect in any way the substantial averments of fact necessary to state any cause of action either at law or in equity."

The liberal construction of pleadings will not excuse a failure to include the essential allegations to state a cause of action. Williams v. Rock River Sav. and Loan Ass'n., 51 Ill. App. 2d 5, 13; Church v. Adler, 350 Ill. App. 471, 478.

In order for a cause of action for breach of any contract, including a lease, to lie, it is necessary to allege, and ultimately to

establish by sufficient evidence, the existence of the contract, a breach of the contract by the defendant, and damages to the plaintiff as a consequence of that breach. A complaint that fails to include those allegations is defective and its deficiency may not be remedied by liberal construction.

The amended complaint before us does not allege that the lease was breached by the defendant. It is not stated that the defendant made the unauthorized "changes" to the property or even that the defendant was in possession of the property at the time or times that the "changes" occurred. It also fails to allege that the plaintiffs suffered any compensable damages but only avers that they "found that extensive damage had been done" to the property. The prayer for judgment in the amount of $2000.00 was, under the circumstances, purely gratuitous since the pleadings failed to allege facts on which a judgment in any amount could be predicated.

The order of dismissal entered by the trial court was proper and should be affirmed.

Judgment Affirmed.

DAVIS, P. J. and MORAN, J. concur.

52089

A

SUSAN A. I. SCHULTZ, a Minor, by MARY SCHULTZ, her Guardian and Next Friend, Plaintiffs-Appellees, v. MURAD AGENLIAN, AMERICAN NATIONAL BANK & TRUST COMPANY, as Trustee under Trust No. 22590, CHICAGO CITY BANK & TRUST COMPANY, as Trustee under Trust No. 5596, BANK OF LYONS, an Illinois Banking Corporation, MARY SCHULTZ, UNITED STATES OF AMERICA, and RALPH ROBINSON, as Administrator of the Estate of A. A. SCHULTZ, Deceased, Defendants, Appeal of MURAD AGENLIAN and AMERICAN NATIONAL BANK & TRUST COMPANY, as Trustee under Trust No. 22590, Defendants-Appellants.	Appeal from the Circuit Court of Cook County, Chancery Division.

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal from an order denying a motion to vacate a temporary injunction. The injunction restrained the defendants from enforcing a judgment for possession and from taking any steps towards dispossessing the plaintiff of her home. The injunction was issued after the defendants answered the plaintiff's complaint and after a hearing was had on her motion.

The complaint and answer disclosed the following: The plaintiff is a minor. Her parents, Alvin and Mary Schultz, were the sole beneficiaries of a land trust which consisted of the family home. Her parents were divorced in 1960 and, in 1961, the trustee executed a mortgage on the trust property. In 1962 her mother obtained a judgment against her father for arrearage in alimony and the court ordered him to assign his 50% interest in the trust to her mother. He complied with the order two days later. The mortgage note was

defaulted and in 1963 a foreclosure suit was started. In his answer to the foreclosure complaint, which he filed a week before his death, her father disclaimed any interest in the trust. A decree of foreclosure was entered in 1964, the property was sold by a master in chancery and was subsequently purchased by the defendant, Murad Agenlian. In 1966 Agenlian started a forcible entry and detainer suit in the Municipal Department of the Circuit Court against the plaintiff's mother and obtained a judgment of possession and a writ of restitution.

In the present case the plaintiff's complaint alleged that the issuance of the writ was imminent and that she was in danger of eviction unless the defendants were restrained from enforcing the judgment. She stated that her father had a 50% interest in the land trust and the proceeds of the mortgage sale, and that the proceeds exceeded the mortgage debt and expenses; that her father died intestate during the pendency of the foreclosure suit; that she was his only heir at law but that neither she nor the administrator of his estate was substituted for him as a party to the suit. She further alleged that she neither received notice of nor appeared in the forcible entry action. In addition to requesting temporary and permanent injunctions restraining the defendants from dispossessing her, she prayed that the master's deed be declared null and void and that she be permitted to redeem the property.

The defendants' answer denied that the plaintiff succeeded to any interest in the land trust, or that it was necessary to substitute her or the administrator of her father's estate in the foreclosure suit. The answer asserted that since she claimed under her father she was bound by the assignment of his beneficial interest in the trust and by his disclaimer of interest in the property.

[1-3] The parties have argued in this court all the ultimate issues raised by their pleadings. These issues were not, with finality, passed upon by the chancellor and we will not pass upon them here. The merits of a controversy are not brought before a reviewing court by an interlocutory appeal. Shatz v. Paul, 7 Ill.App.2d 223, 129 N.E.2d 348 (1955). The complaint and answer raised debatable issues of law and fact, and the chancellor merely decided that the position of the parties should be held in status quo until the issues could be decided. This is the purpose of a temporary injunction. It is not the purpose of a temporary injunction to determine controverted rights or to decide the merits of a case.

[4] The complaint, itself, presented a prima facie case. Section 18, chapter 77 (Ill.Rev.Stat. 1965) provides that a defendant's heirs, executors or administrators may redeem real estate sold by virtue of foreclosure. Moreover, it is a general rule in chancery pleading and practice that all persons who are legally, equitably or beneficially interested in the subject matter of the litigation must be made parties to the suit. Oglesby v. Springfield Marine Bank, 385 Ill. 414, 52 N.E.2d 1000 (1944). In addition to the statute and the equity rule the defendants' answer alleged, on information and belief, that the trust agreement in question provided that in case of the death of any beneficiary his interest in the trust would pass to his executor or administrator. Whether the foregoing was actually a provision in the Schultz trust agreement, whether Alvin Schultz was a necessary party to the foreclosure suit and, if he was, whether his administrator or sole heir should have

been substituted for him upon the suggestion of his death, or whether his assignment and disclaimer of interest extinguished whatever interest he might have had are, in the first instance, questions for the chancellor's adjudication.

[5,6] A temporary injunction is granted before the hearing of a case for the purpose of preventing a threatened wrong or the further perpetration of an injury. H.K.H. Development Corp. v. Metropolitan Sanitary District, 47 Ill.App.2d 46, 196 N.E.2d 494 (1964). The plaintiff's complaint alleged that she was threatened with a wrong: eviction from her home. She showed that an emergency existed and that she was in danger of irreparable harm. She did not have to make out a case which would have uncontrovertibly entitled her to the relief prayed for in her complaint. It was sufficient if from the complaint, answer and whatever was adduced at the hearing, she established that there was a reasonable likelihood that she would ultimately prevail. Centennial Laundry v. West Side Org., 55 Ill.App.2d 406, 204 N.E.2d 589 (1965); Weingart v. Weingart, 23 Ill.App.2d 154, 161 N.E.2d 714 (1959).

[7-9] An application for a temporary restraining order is addressed to the conscience and discretion of the court. Unless the court's discretion has been abused the reviewing court will not set aside the trial court's order. The relative injury that might be suffered by the parties from granting or refusing the injunctive relief was disparate and the court did not abuse its discretion by ruling that their respective positions should be preserved until there was a final hearing on the merits of the case.

[10] Furthermore, the court did not exceed its jurisdiction in entertaining the cause of action. This was not a case where a court

of concurrent jurisdiction pre-empted jurisdiction from a court which had validly assumed jurisdiction. Pepin v. City of Chicago, 79 Ill.App.2d 295, 224 N.E.2d 587 (1967). There was no violation of the principle that when two actions involving the same subject matter are brought in different courts having concurrent jurisdiction, the court first lawfully obtaining jurisdiction may retain it until the end of the controversy to the exclusion of other courts. Shilvock v. Shilvock, 31 Ill.App.2d 254, 175 N.E.2d 272 (1961); Hudson v. Mandabach, 22 Ill.App.2d 296, 160 N.E.2d 715 (1959). The forcible entry case in the Municipal Department of the Circuit Court and the complaint filed in the Chancery Division of the County Department were different actions for different purposes; the subject matter was not the same, the issues were not the same and the plaintiff was not a party to the first case.

There is one other aspect of this dispute which we believe it is advisable to comment upon. A prior opinion of this court (Sterling Savings & Loan Association v. Schultz, 71 Ill.App.2d 94, 218 N.E.2d 53 (1966)) was cited in the plaintiff's complaint and the defendant Agenlian's answer and is quoted extensively in their briefs in this court. Since our opinion is partially relied upon by both parties, and since it may have been a factor in the chancellor's preliminary consideration and may enter into his final determination of the merits, further elucidation may be of assistance.

Sterling Savings held the mortgage on the Schultz property and brought the foreclosure suit referred to heretofore. The suit named the trustee and Alvin and Mary Schultz as defendants. The Bank of Lyons was subsequently added as a defendant. The bank had obtained a judgment against Alvin Schultz in May 1961 and had filed

a creditor's bill to enforce the judgment. After the foreclosure sale, and the payment of the mortgage debt and expenses, a surplus remained. The bank claimed an equitable lien upon Alvin Schultz' beneficial interest in the trust and in the surplus. Mary Schultz also claimed the surplus. She asserted that she was the owner of the entire beneficial interest because of the assignment her husband made to her in October 1962, and she also claimed an equitable lien because of payments she had made on the mortgage debt and for the maintenance of the property. The trial court held for Mary and the bank appealed.

[11] This court decided that Mary was not entitled to a lien on the surplus funds but that, as beneficiary of one-half of the land trust, she was entitled to one-half of the surplus. After pointing out in our opinion that a beneficiary's interest in a land trust is personal property, we held that by filing its creditor's bill the bank obtained a lien on Alvin's interest in the trust and was, therefore, entitled to a lien upon this interest and the surplus resulting from the foreclosure sale.

The plaintiff, in the present case, interprets the Sterling opinion as invalidating her father's assignment for all purposes and as holding that her father had at the time of his death a one-half interest in the trust; she concludes that this interest, although subject to the bank's lien, is an asset of his estate. The defendant Agenlian, on the other hand, interprets the opinion as invalidating the assignment only insofar as it affected the Bank of Lyons; he concludes that the assignment was effective against the assignor and remained so against those claiming under him.

In the Sterling case we were dealing only with the conflicting claims of Mary Schultz and the Bank of Lyons. The bank's

judgment was obtained in May 1961, its execution issued in August 1961 and its creditor's bill was filed on April 13, 1962. We held that its lien attached as of the date the creditor's bill was filed. The trust became impressed with this lien prior to Alvin's assignment to Mary, which was dated October 21, 1962. At various times in the opinion we mentioned the "one-half interest" of Alvin Schultz under the land trust. These references should not be construed to mean that he had a continuing interest in the trust despite his assignment of October 1962 and his disclaimer of interest of May 1963. These questions were not before us in the Sterling case. When we referred to his "one-half interest" we did so only in relating the history of the case and in determining his interest at the time the Bank of Lyons filed its creditor's bill.

The order of the Circuit Court is affirmed.

Affirmed.

Sullivan, P.J., and Schwartz, J., concur.

50855

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
vs.	)	COOK COUNTY,
RONALD MORRIS, Defendant-Appellant.	)	CRIMINAL DIVISION.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty at a jury trial of the crime of murder and sentenced to a term of 50 to 100 years in the penitentiary. He appeals.

Defendant maintains that he was not proven guilty beyond all reasonable doubt; that the trial court erred in calling one of the State's witnesses as a court's witness; that it was error to allow the same witness to testify from his written statement previously given to the police; and that it was error for the court to refuse defendant's tendered instruction with regard to alibi inasmuch as alibi is an affirmative defense and the State's case contained evidence of alibi.

On January 5, 1964, Miss Katie Stallworth, 72 years of age, was found stabbed to death in her apartment at 4331 South Federal Street in Chicago. There were no known eyewitnesses to the slaying. The testimony of a coroner's pathologist indicated, and the prosecuting attorney agreed, that the death occurred approximately 7:00 or 7:30 P.M. on Saturday, January 4, 1964. The pathologist testified that in his post-mortem examination he found two wounds inflicted in the area of the chest which were the cause of death, in addition to numerous lacerations inflicted after death in the area of the thighs, vagina, breasts and face. He further stated he found a broken knife blade, measuring about five and one-quarter inches in length, implanted in one of the chest wounds and that he

observed fingernail marks and abrasions on the deceased's back and face; the deceased also suffered a fractured jaw and damage to her denture.

Defendant Ronald Morris, aged 17, lived in the same building as the deceased with his parents and brother, as did three of the witnesses who testified, Edward "Blood" Jackson, Ernest Harding and Hampton Kendrick. Defendant was arrested on January 23, 1964, and was later charged with the murder of Miss Stallworth.

Edward "Blood" Jackson, aged 30, was called as a State's witness, but after a number of questions were asked by the prosecuting attorney and it appeared that Jackson would be hostile and uncooperative, a motion was allowed that Jackson testify as a court's witness. Jackson testified that he earned the nickname "Blood" because he drank wine. He stated that about 9:30 P.M. on the night of January 4, 1964, a Saturday, he and defendant were in defendant's room talking about "getting high." Jackson testified the conversation turned to women and defendant stated he had sexual intercourse with a woman, purportedly his girlfriend, that he stabbed her to death, and that the wounds were inflicted in the area of the breasts and vagina. Jackson stated he told defendant he did not believe him and was told by defendant to go to the deceased's room and observe for himself, which Jackson declined to do. Jackson further testified defendant attempted to prove his acts by showing Jackson some of the deceased's blood on his undershorts and a spot of blood on his shoe.

Jackson testified that he went downtown to his uncle's place of employment the following morning and when he returned about 9:30 or 10:00 A.M. he saw a police car in front of the apartment building and saw the deceased being removed. The witness stated he thereafter saw defendant in the building and defendant stated, "See, I told you," to which Jackson replied, "I thought you were

jiving [kidding]." Jackson testified he saw defendant later that day in defendant's room with Hampton Kendrick, Walter Williams and defendant's brother, William Morris, who were pooling money to purchase wine. Unable to raise enough money in this manner, defendant gave Jackson a watch to sell to raise more money. The watch, inscribed with deceased's name, was identified at the trial by the deceased's brother as having belonged to the deceased. Jackson attempted to sell the watch on the eighth floor of the building but was unable to do so. He and Kendrick then went to a nearby liquor store but were unable to sell the watch and returned to the apartment. Jackson testified at one point he tried to sell the watch before defendant told him of the slaying and at another point that the sale was attempted after he was told of the slaying.

Ernest Harding, aged 17, testified that he, defendant and several other persons were in an apartment at 4352 South State Street "jiving and drinking wine" about 10:00 P.M. on Saturday, January 4th. Defendant told Harding that he entered a woman's apartment for the purpose of making a telephone call and that he stabbed her to death. Harding stated that defendant told him he used two knives in the stabbing because one of the knives "broke off while he was stabbing her, into this person's body." The witness further testified he was with defendant from 10:00 P.M. until 11:30 that night. In a statement given to the police in January, 1964 Harding stated he was with defendant from 7:30 P.M. until 11:15 P.M. on the night of Saturday, January 4th. Harding further testified he did not recall seeing Edward Jackson that evening.

Walter Williams, aged 19, testified for the State and related he knew defendant some two years. Williams testified he saw defendant about 3:00 or 4:00 P.M. on the afternoon of Saturday,

January 4th and that they were on their way to a party at 4352 South State Street. Williams testified he remained in defendant's presence until 10:30 or 11:00 P.M. that night, and did not see either Ernest Harding or Edward Jackson that evening.

Williams further testified he had a conversation with defendant about 1:00 P.M. on the following Sunday afternoon in defendant's apartment. Williams stated defendant told him he entered a woman's apartment to make a telephone call, that he began choking her and that he took a knife from the sink and began stabbing her in the breasts and vagina. A short while later that day, Williams testified, he was in defendant's apartment with defendant, Edward Jackson, Hampton Kendrick and defendant's brother William Morris. The group decided to purchase wine, pooled their money and found they did not have enough for the type of wine they desired. The witness and William Morris went out to "hustle some money" and returned with $1.10, again not enough money. Defendant then sold Hampton Kendrick a watch for fifty cents and the group purchased wine. The watch was identified at trial as belonging to the deceased.

Williams testified that a statement given by him to the police in January, 1964, to the effect that a person named "Bimbo" killed Miss Stallworth, was a lie and that that was what defendant told him to tell the police.

Hampton Kendrick also testified for the State and related that he was proceeding to defendant's apartment about 1:00 P.M. on Sunday, January 5th, when he met Edward Jackson coming out of defendant's apartment. The witness testified that Jackson asked him to accompany Jackson to a nearby liquor store to sell a watch. Unable to sell the watch, the two men returned to the apartment building and Jackson gave the witness

the watch to return to defendant. Jackson returned to his own apartment. When Kendrick entered defendant's apartment those present were pooling their money to purchase wine. Being short on funds, William Morris and Walter Williams left to "hustle up some money." Kendrick was prevailed upon by defendant to purchase the watch for fifty cents after the others were unsuccessful in raising the necessary funds. Kendrick also testified that defendant at no time told him that he killed a woman.

Two witnesses testified for the defense, Ruth Barbour and her daughter Willa Mae. Ruth Barbour testified that she lived in the same apartment building as did the defendant and the deceased on the date of the incident. About 1:30 P.M. on Saturday, January 4th, Edward Jackson came to her apartment on the eighth floor of the building and offered to sell her a watch, which she refused. She stated she was certain of the time and the day because her husband worked on Saturdays until noon, normally arrived home about 1:30 or 2:00 P.M., and had not as yet returned. Willa Mae Barbour's testimony was to the same effect and further that the watch in evidence was the same watch Jackson attempted to sell to her mother. Edward Jackson testified in rebuttal that he did attempt to sell the watch to Mrs. Barbour, but that she refused. He stated that was the reason he went to the eighth floor of the building after defendant gave him the watch to sell.

Defendant first maintains he was not proven guilty beyond all reasonable doubt. The record discloses sufficient evidence whereby the jury could reasonably have found defendant guilty. Edward Jackson testified that defendant told him he killed a woman by stabbing her in the area of the breasts and vagina; the same testimony was given by Walter Williams. The pathologist corroborated this evidence by testifying that the deceased

was stabbed and cut in the area of the thighs, vagina, breasts and face. Ernest Harding testified that defendant told him he stabbed a woman to death and in the process left a knife blade broken off in the body; the pathologist testified he found a five and one-quarter inch knife blade implanted in one of the chest wounds which were the cause of death. Edward Jackson testified that defendant gave him a watch, later identified as having belonged to the deceased, which was to be sold. When Jackson was unable to sell the watch, it was returned to defendant. Walter Williams and Hampton Kendrick testified that defendant sold the watch to Kendrick for fifty cents. The conflicts in the testimony of the witnesses were stressed in the closing argument of defense counsel; the jury nevertheless chose to find defendant guilty. People v. Perroni, 14 Ill. 2d 581, 592-593.

Defendant next contends the trial court erred in making Edward Jackson a court's witness. The record establishes that after some thirty questions were propounded to the witness, the prosecuting attorney requested a hearing outside the presence of the jury. The court allowed a motion that Jackson be made a court's witness for the reason that he was hostile and uncooperative, the court specifically noting that the witness and the defendant knew each other for some length of time and lived in the same building, that the demeanor of the witness was taken into consideration, and that it was apparent that the witness did not intend to cooperate in any way unless forced to do so. The court did not abuse its discretion in allowing the motion that Jackson testify as a court's witness. (See People v. Siciliano, 4 Ill. 2d 581, 590-591.)

The third point raised by defendant is that the trial court erred in permitting Edward Jackson to testify from a statement which he gave to the police in January, 1964. It appears the statement was used by the prosecution on re-crossexamination to

refresh Jackson's recollection as to the specific hour he had the conversation with defendant on the night of January 4, 1964, concerning the stabbing. Prior to this Jackson testified that it was dark when the conversation took place. After the prosecuting attorney requested Jackson to look at the statement, Jackson replied, "I know what I got in the statement." It should also be pointed out that defense counsel made no objection that the witness be instructed not to read from the statement. The People concede that in his re-crossexamination of Jackson the prosecutor used language "unfortunately phrased." We assume that on a retrial this will be avoided.

The final contention raised by defendant is that the trial court erred in refusing to give the jury an instruction tendered by the defense relating to alibi, inasmuch as alibi is an affirmative defense and the evidence of the State showed defendant to have been in a place other than the deceased's apartment at the time of her death. We agree.

Where there is evidence in the record, even though slight, the defendant or the State, as the case may be, is entitled to have the jury instructed as to the law applicable to any state of facts shown by such evidence. People v. Matter, 371 Ill. 333, 338; People v. Provo, 409 Ill. 63. The defense of alibi is an affirmative defense (People v. Todaro, 14 Ill. 2d 594,) and unless the State's evidence raises the issue involving the defense, the defendant must present some evidence in order to raise the issue. Ill. Rev. Stat. 1965, ch. 38, § 3-2(a). If such an issue is raised, it is incumbent upon the State to prove the defendant guilty beyond all reasonable doubt as to that particular issue as well as to all the other elements of the crime charged. Ill. Rev. Stat. 1965, ch. 38, § 3-2(b).

As the State's case reveals, there was evidence that defendant was elsewhere at the time the deceased was killed. According

to the State's theory, the deceased was killed at "approximately 7:00 o'clock on January the 4th" in the evening. This is what the testimony of the pathologist tended to prove and this is what the prosecuting attorney admitted. The testimony of State's witness Walter Williams, however, was to the effect that he and defendant were together from 3:00 or 4:00 P.M. in defendant's apartment, until 10:30 or 11:00 P.M. at a party at 4352 South State Street on that date. No contention is made by either side that death took place other than immediately. Defendant pleaded not guilty to the crime of murder of Miss Stallworth, and the State's evidence provided a theory of defense which the defendant could submit to the jury by way of argument and an instruction on the law pertaining to alibi. Defense counsel argued the question of alibi to the jury in closing argument. It was error to refuse defendant's tendered instruction on alibi as required by the evidence and the law. People v. Scott, 401 Ill. 80, 86; see also 21 Am Jur 2d, Criminal Law § 136 and 88 C.J.S. Trial §§ 401, 407.

The judgment is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED FOR A NEW TRIAL.

LYONS, P.J., and McNAMARA, J., concur.

ROUTING SHEET

Date: 12-11-68

(Indicate routing by number. When forwarding, initial and cross out your unit's name.)

Fr (Unit) Prep (Individual)

To

- Pres
- See to Pres
- Exec Vice Pres
- Secretary
- Treasurer
- Controller
- **Syst Dept**
- *O in C Plant & Equip*
- *O in C Adv & Sales*
- **Adv Dept**
- **Sales Dept**
  - Adm Asst
  - Order Processor
  - L Sch Div
  - Misc Div
  - Salesmen Div
  - Trade Div
- *O in C Publs*
- 1 **Edtl Dept** (Marian)
- 2 **Prep Dept**
- **Pub Pl Dept**
  - Prod Asst
- *O in C Bus Mgmt*
- **Acct Dept**
- **Bus Dept**
  - Bill Div
  - Bkkg Div
    - Cash Sec
    - Corresp Sec
    - Files Sec
    - Posting Sec
    - Roldex Sec
  - Credit Div
- **Off Serv Dept**
  - Bldg M&Tr Div (Chgo)
  - Dicto Div
  - Mail&Phone Div
  - Pur Div
- **Sub Dept**
  - Checking Div
  - Mach Room Div
  - Records Div
- **Pers Dept**
- **Req Dept**
  - JB Div
- *O in C Mfg*
- **Mfg Dept**
  - Adm Sec (Mfg)
  - Bldg M & Tr Sec (Mund)
  - Prod Sched Sec
  - Comp Div
    - Hand Sec
    - Lino Sec
    - Photo Plate Sec
    - Proof Sec
  - Press-Bind-Ship Div
    - Bind Sec
    - Press Sec
    - Ship & Rec Sec
  - Credit Union
  - Benevolent Assn
  - JB & Co (Md)

For Action | For Info | See Me | Call Me | File

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Other: _____ Other: _____

RE: Gen No. 52,130

Shall we add "Appeal of Daily"

as Id case Rec for Tab 2

per NE No

52130

IRA MAE FORTEE, Plaintiff-Appellee, vs. LICENSE APPEAL COMMISSION OF THE CITY OF CHICAGO, A. L. CRONIN, Chairman, and RICHARD J. DALEY, Local Liquor Control Commissioner of the City of Chicago, Defendants.	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.
RICHARD J. DALEY, Local Liquor Control Commissioner of the City of Chicago, Defendant-Appellant.	

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

The Local Liquor Control Commissioner of the City of Chicago prosecutes an appeal from a judgment reversing an order revoking plaintiff's liquor license. Plaintiff did not file a brief or appearance.

Ira Mae Fortee has held a local liquor license for the premises at 558 East 43rd Street, Chicago, since December 11, 1964. On February 10, 1966 the Mayor instituted proceedings to revoke the license. On March 2, 1966 a revocation hearing was had. Based upon the evidence adduced the Commissioner found that the plaintiff had struck Lofton Jones on the forehead with a beer bottle while upon the licensed premises, unlawfully employed Estelle Gaines as a barmaid and served intoxicating liquor to Betty Randle, a minor. By committing these acts upon the licensed premises plaintiff conducted her business in a manner injurious to the public welfare, health and safety, in violation of the statutes of Illinois and the ordinances of Chicago. These violations constituted cause for the revocation of the license and the Commissioner properly exercised his discretion in determining that the license be revoked to protect the public welfare.

The Mayor is charged with the responsibility of maintaining peace and order in the municipality and his judgment thereon should not be disturbed where there is substantial evidence to support the charge.

The judgment is reversed.

JUDGMENT REVERSED.

LYONS, P.J., and McNAMARA, J. concur.

A

No. 52009

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	)	WRIT OF ERROR TO THE
	)	CIRCUIT COURT OF
v.	)	COOK COUNTY,
	)	CRIMINAL DIVISION.
FRANK DISMUKES (Impleaded), Plaintiff in Error.	)	

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

On May 28, 1963, Dismukes and one Mack Weatherly were tried by the court without a jury on a charge of rape and both were found guilty. Weatherly was sentenced to a term of five to fifteen years. Dismukes was sentenced to a term of eight to fifteen years. In another case, tried on August 5, 1963, Dismukes was found guilty of robbery and sentenced to five to ten years for armed robbery. Sentences in both cases were to run concurrently. Weatherly has not joined in this writ of error, and the only matter before us therefore is the review of the judgment rendered against Dismukes on May 28, 1963. He contends there was no corroboration of the complaining witness's testimony as to the use of force, that her testimony is rendered improbable by the facts, and that the testimony of a corroborating witness was discredited.

Following is a summary of the evidence presented at the trial.

Miss Ethel Harris, age 20, testified that on May 12, 1962, in the early morning hours, she was being driven home by one Mel London, after visiting two lounges with London and a girl friend Roberta Yates. London stopped his car in an alley and "propositioned" her, but she rejected his advances and got out of the car. London was later called to testify

and he corroborated this portion of Miss Harris's testimony. She further testified that after getting out of the car, she walked around the corner to a service station and then started walking toward a bus stop. As she walked, she saw two men, whom she later identified as Weatherly and Dismukes, coming toward her and heard one of them say, "Grab her." She turned to run, but they caught her. She resisted and scratched them, but they overpowered her and put her into the back seat of a car. Dismukes held her down in the back seat and struck her with his fists while Weatherly drove the car to an alley at 1400 South Keeler Avenue, in Chicago. She continued to fight and scream, but the defendants placed their hands over her mouth and took her into a basement, leaving the car in the alley. One of the defendants said he had a gun and would kill her. Dismukes pushed her onto a couch. They took her panties off, raised her dress, and both of the defendants had intercourse with her, Weatherly twice and Dismukes once. They then placed her between them on the couch and went to sleep. When she thought they were asleep, she got up, left the basement and told a woman living in the building that she had been raped and used the woman's telephone to call the police. Two police officers arrived in time to apprehend the defendants, who were still asleep in the basement. It was stipulated at the trial that Miss Harris was examined at Mt. Sinai Hospital and showed evidence of having had recent sexual intercourse.

Officer Henry Kaminski, a detective with the Chicago Police Department, testified that he was present at the police station on the morning of May 12, 1962, and saw Miss Harris and the two defendants in the station. He testified that a picture was taken of Miss Harris and that it accurately portrayed her

appearance on that morning. The picture was introduced into evidence to show that her eye was swollen and discolored. Kaminski testified that he went to the basement in question and there found part of a string of pop pearls which Miss Harris identified as hers. He searched the area and found an automobile which matched the description given by her. The car was parked on 15th Street between Keeler and Kedvale Avenues, about a block away. In the car on the floor in the rear was a shoe which Miss Harris identified as hers, together with more of the same kind of pearls previously found in the basement and a button. Kaminski identified three photographs of the car as it appeared that morning. Finally, he testified that this automobile was the same automobile that Mack Weatherly identified as belonging to his father. A photostatic copy of an application for a 1962 license plate was introduced to show that license number MD4044, the number on the car used by the defendants, was issued to John D. Weatherly, Mack's father.

Weatherly's father was called, and he testified that he owned an automobile which fitted the description of the automobile found by Kaminski. He also testified that his son drove the automobile; that on it were license plates MD4044 and that those plates were never stolen during May, 1962. When shown pictures of the car found by Kaminski, however, he denied that they were pictures of his car.

The defendants testified and admitted to having had sexual intercourse with Miss Harris, but they denied that it was without her consent. They both testified that they had met her in front of Scotty's Lounge on May 11, 1962. Dismukes

testified that she already had a black eye when he met her. They further testified that she asked them if she could have some liquor and that they walked with her to the basement where they had intercourse with her. They both denied ever having been in the car with her, and Weatherly testified that he had parked and locked the car at 15th Street and Kedvale Avenue at 9:00 p.m. the night before. They denied ever striking or threatening her, and they both alleged that she freely consented to having sexual relations with them. They further testified that after having intercourse with them, she wanted a ride home, but that they refused. Weatherly testified that he and Dismukes lay down to go to sleep and that just before they fell asleep, Miss Harris walked out, saying "I'll fix you." They then slept until the police arrived.

Defendant's first contention is that there is no corroboration of Miss Harris's testimony as to the use of force. Her testimony in that respect is corroborated by the picture in evidence showing her swollen and discolored eye, by the loss of two buttons from her coat, by the presence in Weatherly's car of a broken string of her beads, her coat button and her shoe and by the presence in the basement of articles of clothing belonging to her.

Defendant's second contention is that Miss Harris's testimony is rendered improbable by the facts. He points out that although she alleges she kicked and scratched during the entire affair, the State offered no evidence of marks or bruises on either defendant. The fact that no evidence was presented by the State showing marks on the defendants does not establish that there were none, nor does it follow that Miss Harris did

not resist. She was no match for the two men and it would not have been difficult for them to subdue her.

Defendant also contends that it is unlikely that a woman could scream, as Miss Harris alleges she did, in a residential area and not be heard. It may well be that her screams were heard, but no one cared to respond or, as she was taken quickly from the car to the basement, any one hearing her screams would have found no one there by the time they reached the scene.

Defendant argues that there is a discrepancy in Miss Harris's testimony, since she testified the car was left in an alley, but the police found it a block away after arresting the defendants. Either one of the defendants could have moved the car while the other was committing the offense.

Defendant also contends that it unlikely that the defendants would just fall asleep after raping Miss Harris and allow her to call the police. Both admitted drinking to excess that night, and it is not unreasonable that sleep would result.

Defendant contends that Miss Harris's answers on cross-examination indicate she was angry at not having been given a ride home and that this was the reason she called the police. When asked on cross-examination whether she would have been as angry if the defendants had taken her home after the acts which took place in the basement, she replied, "I don't know if I would." Counsel then asked, "You would have felt better if they had taken you home?" She again answered, "I don't know." A reading of her entire testimony reveals that these answers do not reflect the lack of interest or want of sincerity which the defendant would ascribe to them.

Defendant's testimony that they left Weatherly's car parked and locked at 15th Street and Kedvale Avenue at 9:00 p.m.; that they met Miss Harris for the first time at 2:00 a.m.; that they walked with her seven blocks to the basement at 1400 South Keeler Avenue; that they had intercourse with her and that they then fell asleep, is not credible. When Weatherly's car was found by the police officer, it contained Miss Harris's shoe, pop beads from her necklace and a button from her coat. Weatherly testified that he locked the car, and this negates any possibility that Miss Harris could have planted her property in the car, even if she had somehow discovered which car was his.

Defendant contends that London was discredited as a witness because he was motivated by a desire to cover up what he himself had done, and that his testimony could not be believed because of his own admitted promiscuity and because he asked Miss Harris if she would have intercourse with him. These are matters which bear on the question of credibility, which was for the trial court to determine.

The evidence establishes guilt beyond a reasonable doubt, and the judgment is affirmed.

JUDGMENT AFFIRMED

SULLIVAN, P.J. and DEMPSEY, J. concur.

51539

ALDONA BEINARAUSKAS, Plaintiff-Appellant,	)	APPEAL FROM THE CIRCUIT
vs.	)	COURT OF COOK COUNTY,
ANTHONY BEINARAUSKAS, Defendant-Appellee.	)	CHANCERY-DIVORCE DIVISION.

MR. PRESIDING JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff, Aldona Beinarauskas, from the entry of an order, in a bench trial, at the close of all the evidence, dismissing her two count complaint for separate maintenance or divorce for want of equity. Plaintiff had originally filed a single count complaint for separate maintenance which complaint was subsequently amended to add her alternative prayer for divorce predicated upon alleged acts of extreme and repeated cruelty. Defendant, Anthony Beinarauskas, both in his pleadings and at trial, denied the misconduct attributed to him. He did not file a counterclaim. The order of dismissal was entered after rather protracted hearings on the contest over a period of four days wherein eleven witnesses were called to testify.

Although he was the prevailing party in the trial court, defendant has failed to file with this court any brief in opposition to the merits of plaintiff's contentions. Plaintiff having complied with all the statutory requirements and rules of the Appellate Court in perfecting her appeal, judgment may be reversed without initial consideration of the cause on its merits. Basinski v. Basinski, 20 Ill.App.2d 336, 156 N.E.2d 225 (1959); Taylor v. Taylor, 70 Ill.App.2d 201, 217 N.E.2d 89 (1966); 2 I.L.P., Appeal and Error, §560, p.514.

For the above reasons, the order is reversed and the cause remanded for a new trial.

ORDER REVERSED AND CAUSE REMANDED FOR A NEW TRIAL.

BURKE, J., and McNAMARA, J., concur.

52514

AMERICAN NATIONAL BANK & TRUST CO. under Trust #13303, by Herbert S. Kamin, Jr., Agent,	)	
Plaintiff-Appellee,	)	APPEAL FROM THE
vs.	)	CIRCUIT COURT OF
LOWELL CHARLES BERGSTEDT,	)	COOK COUNTY,
Defendant-Appellant.	)	MUNICIPAL DIVISION.

MR. PRESIDING JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

This is an appeal, pro se, by the defendant, Lowell Bergstedt, from the entry of an order below denying his motion to vacate a judgment by confession against him by the court. Defendant originally prosecuted this appeal directly to our State's Supreme Court, which court on its own motion, transferred the cause to the First District Appellate Court upon the grounds that there was involved no substantial constitutional question.

It appears from the pleadings filed that defendant had executed a written lease for the occupancy of an apartment under the management of plaintiff, by and through its agent, one Herbert Kamin. The lease was to run for a period of one year commencing March 1, 1965 and, among its other terms, provided for a confession of judgment by the lessee in the event of a breach. In August of 1965, during the tenure of the lease, and in purported reliance upon certain oral representations made by an agent for plaintiff to accept a substitute tenant in his stead, defendant vacated the premises. Shortly thereafter, plaintiff's consent to the substitution was withdrawn, despite a desire for immediate occupancy, for the averred single reason that the proposed sublessees' adopted child was a negro. The defendant's removal from the premises was considered a breach of the lease by him and the judgment by confession on the lease

for two months rent plus costs was herein obtained.

Defendant filed the instant motion some four months subsequent to the judgment, averring therein the existence of a meritorious defense, predicated upon plaintiff's unwarranted and unlawful violation of the Chicago Municipal Code, Chapter 198.7B (Fair Housing Ordinance), as well as the invalidity of the lease contract by reason of its overburdensome and unconscionable restrictions upon the lessee. Defendant further alleged to have been diligent in the preservation of his rights. To this motion plaintiff never addressed an objection, reply or counteraffidavits, nor has plaintiff on appeal filed any response to the merits of the present cause.

Failure by a plaintiff to file an appellee's brief in the reviewing court is tantamount to a confession of error by it, empowering the court, in and of itself, to reverse the judgment of the lower court without initially considering the cause on its merits. Oak Park National Bank v. Montanelli, 67 Ill.App.2d 235, 216 N.E.2d 472 (1966); Ill.Rev.Stat.(1967) Chap.110, par.101.341.

The order denying defendant's motion to vacate the judgment is reversed, and the cause remanded with directions to enter an order opening the judgment, that the affidavits stand as an answer, and that the judgment by confession stand as security for plaintiff's demand and execution be stayed until the further order of the court.

ORDER REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

BURKE, J., and McNAMARA, J., concur.

NO. 67-97 Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

HARRY V. JOHNSON & SONS, INC., a corporation, Plaintiff-Appellee, vs. CLIFFORD A. PEDDERSON, Defendant-Appellant, and WILLIAMS-MANNY-STEVENS & ENGSTROM, INC., a corporation, Defendant-Appellee.	)	Appeal from the Circuit Court of the 17th Judicial Circuit, Winnebago County, Illinois.

MR. JUSTICE MORAN DELIVERED THE OPINION OF THE COURT:

Defendant, Clifford A. Pedderson, appeals from a judgment for Four Hundred Ninety-six Dollars and Eleven Cents ($496.11) entered against him in favor of plaintiff. The appeal of his co-defendant has been heretofore dismissed.

Defendant and his wife are the owners of a business building in Rockford. On February 11, 1966, a truck owned by Smith Oil Corporation ran into the building causing damage which necessitated temporary repairs to enclose the building and to support a wall which was left in a sagging condition as a result of the collision.

Shortly after the accident, Harry Johnson, Secretary-Treasurer of the plaintiff corporation, drove past the site of the accident and stopped to examine the damaged building. He there spoke to the defendant and offered the services of his firm to make temporary repairs. Defendant stated that the matter was in the hands of the insurance company and, shortly thereafter, one Harley Mullins, an insurance agent, arrived at the scene. At that time Mr. Mullins' agency had written insurance for the first floor tenant of the building and it had also written a liability policy for the oil company whose truck had smashed into the building. Defendant was unaware of this relationship and had the erroneous impression that Mullins had written Pedderson's own insurance on the building.

Mr. Pedderson told Mr. Johnson to make the necessary arrangements with Mr. Mullins.

The evidence is in conflict as to whether or not defendant was still present when Mullins told Johnson to go ahead with the temporary repairs or whether he had already left the building while Johnson and Mullins were still discussing the situation. Within the next 48 hours, Johnson's firm, directly and through subcontractors, performed work in the form of removing damaged property, constructing a temporay enclosure and supporting the wall for which the Johnson firm submitted a statement in the amount of One Thousand One Hundred Six Dollars and Sixteen Cents ($1,106.16).

Pedderson was able to negotiate only a Six Hundred Ten Dollar and Five Cent ($610.05) settlement with his own insurance carriers and paid that amount to Johnson on August 8, 1966, by mailing his check to Johnson with a letter which provided as follows:

> "Gentlemen:
>
> I received from the Security Insurance Company and from the North River Insurance Company a total of $610.05 which they have paid on your account and they are refusing to pay the balance of your account on the grounds that the barricade was more substantial than was necessary for the preservation of the property.

"It seems to me that the Smith Oil Corporation that caused the damage in the first instance is liable for the entire damage and I am filing a suit in behalf of Doc Whitson (the tenant) for damages to him by reason of the interruption of his business and, if this damage would have been greater if the barricade had not been built, it seems to me you have a claim against Smith Oil. Further, it would seem to me that when Mr. Mullins ordered you to proceed, he or his insurance company would be liable for the work but possibly there might be some limitation on his liability as he may not have contemplated such extensive work when he talked to you at the building.

I enclose my check in the amount of $610.05 representing payment as set forth in the first paragraph of this letter.

Very truly yours,

C.A. Pedderson"

On August 22, 1966 defendant wrote to plaintiff as follows:

"I would like to suggest to you that we try to include your claim for work done as a part of the claim of Cortland Whitson. This can be done, I think, on the theory that the additional barricade was essential for the continuation and conduct of Doc's business. If we are unsuccessful in our suit, then you, of course, would have recourse against Mr. Mullins who in turn represented the insurance company in authorizing you to proceed with the barricade. It might be that in the same suit you would include the North River Insurance Company which Mr. Mullins represents.

If you think these suggestions are good, would you please contact me at your earliest convenience.

Very truly yours,

C. A. Pedderson"

Defendant contends in this appeal that he had no contract, oral or written, with the plaintiff, and further, that even if there were a contract, the payment and acceptance by the plaintiff of a lesser sum than claimed constituted an accord and satisfaction.

Although the evidence is in conflict as to whether Mr. Pedderson was present at the time Mullins told the plaintiff to go ahead with the work there is ample evidence to support the proposition that Pedderson knew the work was being done and that he

had designated Mr. Mullins to deal with the plaintiff in connection with ordering the work done. Defendant's insurance companies were not satisfied that all the work performed was necessary for the temporary repairs, however, there was no evidence that the work done was unreasonable and improper under the circumstances. We feel that the evidence was sufficient to justify a finding by the magistrate that the defendant held Mr. Mullins out to be his agent in negotiating for the temporary repairs.

With reference to defendant's argument pertaining to accord and satisfaction, we believe that the correspondence indicates that the defendant recognized that the plaintiff had not accepted the $610.05 payment in full settlement of his claim for payment for work done. It is difficult to see how the plaintiff would have a direct claim against the Smith Oil Company. We have examined the authorities cited by defendant in support of this argument and do not believe them applicable since there was no accord here. Plaintiff was not bound by the settlement made by defendant with his own insurance companies.

JUDGMENT AFFIRMED.

Davis, P.J. and Abrahamson, J. - Concur.

No. 67-46.

In the

Appellate Court of Illinois,

Third District.

Abstract

PEOPLE OF THE STATE OF ILLINOIS, Appellee,	)	Writ of Error to the Circuit Court of Peoria County.
vs.	)	
JILL K. McNULTY, Appellant.	)	

Honorable David C. McCarthy, Magistrate Presiding.

HOFFMAN, J.

The defendant in this case was found guilty of speeding upon the highway in a hearing before the court without a jury. From a judgment assessing a fine of $30 plus $5 costs, she appeals.

The defendant was arrested at approximately 11:30 a.m. on December 26, 1966, by a radar unit operated by the State police. She was charged with driving a 1962 Buick automobile 65 miles an hour in a 50-mile zone. She does not question the accuracy of the radar device, but bases her appeal solely upon the ground that her car was mis-identified, and wasn't the car picked up by the radar.

To properly decide this case, we must consider

the evidence heard by the magistrate.

Trooper Rashert, a ten-year veteran, testified: that he was operating the radar unit; that there were no other cars in the particular lane of travel at the time that he noticed the 1962 Buick automobile; that the speed limit was 50 miles an hour and the radar registered the Buick at 65 miles an hour; that he made a notation of the license number upon the radar graph introduced into evidence; that information regarding the speed and identifying the car was relayed by radio to Trooper Morgan, operating the chase car a short distance down the road. In addition to this direct testimony it was elicited that Trooper Rashert identified the defendant's car on the radar tape as a "convertible", when in truth and fact it was a sedan. Trooper Morgan, a veteran of nine and a half years, testified: that he stopped the 1962 Buick pursuant to the information relayed from Trooper Rashert; that defendant's automobile was the only vehicle coming toward him at the time he received Rashert's message; that defendant was driving; that defendant's husband, a passenger, stated that they were late to catch a train and asked if they could return; that they were allowed to proceed and that later they returned and the defendant was issued a ticket charging her with speeding 60 miles an hour.

The defendant testified: that she was driving a 1962 Buick sedan 50 miles an hour at the scene of the alleged infraction; that she verified this speed by looking at her speedometer; that she was familiar with the area; had driven for 16 years and never had been ticketed for speeding.

The defendant's husband testified that there was a heavy flow of traffic that morning and several buicks were nearby.

The principal argument of the defendant, is that Trooper Rashert, by recording the car as a convertible, when in fact it was a sedan, mis-identified defendant's car. It is argued from this that the trooper clearly could not have read the license number. And it is suggested that, because of all the traffic testified to by defendant's husband, Trooper Morgan obviously stopped the wrong car. In cases involving violations of the Uniform Act Regulating Traffic on Highways, the State has the same requirement as to burden of proof as in other criminal cases. People v. Perlman, 16 Ill.App. (2d) 239. The inferences to be drawn from the facts in evidence are for the trial court to make, and unless they are inherently impossible or unreasonable, they should be accepted on appeal. People v. Wesselmann, 78 Ill.App. (2d) 62, 69. "It is only when this court is able to say, from a careful consideration of the whole testimony, that there is clearly a reasonable and well founded doubt of the guilt of the accused, that it will

interfere on the ground that the evidence does not support the verdict." People v. Schoop, 228 Ill. 44, 47.

We do not believe that "there is clearly a reasonable and well founded doubt of the guilt of the accused" in this case. Two veteran officers identified the defendant as the driver of the vehicle in question; both testified there was no vehicle in defendant's lane or interfering with identification of defendant's car; Trooper Rashert read the license number of defendant's car, marked it on the tape, and Trooper Morgan radioed this number back. It would be clearly improper for us to reverse the factual determination of defendant's identity made by the magistrate.

Before concluding this opinion we should mention that at the time of the trial, the prosecutor moved to amend the complaint to show defendant's speed to be 65 miles an hour rather than the 60 miles an hour written on the original by Trooper Morgan. This amendment was allowed and the defendant complains of this in her brief. However, she states that she does not rely upon this point in seeking her relief here. Such being the case, we need not determine the propriety of this amendment.

The judgment appealed from will be affirmed.

AFFIRMED.

Publish abstract only

NO. 67-22

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. EDWARD R. FORTIN, Defendant-Appellant.	)))))))	Appeal from the Circuit Court of Montgomery County. Honorable F. R. Dove, Judge Presiding.

Goldenhersh, J.

Defendant was tried by jury in the Circuit Court of Montgomery County and convicted of the offense of Attempt (Ch. 38, sec. 8-4, Ill. Rev. Stat. 1965) and of the offense of Battery (Ch. 38, sec. 12-3, Ill. Rev. Stat. 1965). For the offense of Attempt he was sentenced to the Illinois State Penitentiary for not less than 3 nor more than 10 years, and on the conviction for Battery, defendant was sentenced to 6 months at the State Farm, to be served upon his release from the penitentiary.

The indictment charging Attempt alleges that defendant pursued, followed and physically attacked a woman not his wife with intent to commit rape.

The prosecutrix testified that on the afternoon of December 17, 1966, she had parked her car in a lot near the town hall in Litchfield and gone shopping. At about 8:00 P.M. she returned to the lot. At that time she was carrying a large leather purse and a large bag in which she had placed a number of small packages.

As she approached the parking lot she saw a man on the opposite side of the street. He was wearing a gray, white and red plaid mackinaw. She walked a half block to the lot, and started to walk

to her car, which was parked approximately a half block from the street. The lot was unlighted and dark, and her car was the only one there.

When she was approximately half way between the street and her car she was grabbed from behind, and turned around. Upon being asked what further happened, she testified:

> "Then we scuffled, and I was trying to hit him away from me, and I told him to leave me alone, and when I saw he wasn't going to leave me alone, he was trying to throw me to the ground, and I screamed."

The man was a stranger, but she recognized his mackinaw as being the same one she had seen shortly before the occurrence.

He said nothing to her, and her only remark to him was "You leave me alone".

In the scuffle the bag was torn and her packages fell to the ground. The assailant did not attempt to seize her purse.

Eugene Cameron testified that he had parked a pick up truck on the parking lot earlier in the evening, that he returned to it at approximately 8:30, and about 400 or 500 feet away saw a man striking a woman. At first he did nothing about it, being reluctant "to butt into a family quarrel". He saw the woman trying to defend herself and try to hit the man with her purse. It appeared to him that the man was trying to "paw" the woman. She screamed and he ran over to see what was going on. The man ran away. He was wearing a gray, white, and possibly blue plaid jacket. He caught the man, scuffled with him, and the man ran away.

Both Cameron and the prosecutrix testified that her face was bleeding, and she does not appear to have suffered other physical injury.

The defendant was arrested shortly thereafter while wearing a jacket identified by the prosecutrix and Cameron as being the one worn by the assailant. The identification of defendant as the assailant is based upon this identification since admittedly neither witness could otherwise make the identification.

Defendant offered no evidence, and his sole contention here is that The People failed to prove the specific intent charged in the indictment, and the trial court erred in refusing to direct a verdict of not guilty on the Attempt charge, at the close of The People's case.

The People rely principally upon The People v. Mayer, 392 Ill. 257. Defendant relies upon People v. Cieslak, 319 Ill. 221, and People v. Jenkins, 342 Ill. 238.

Defendant argues that in People v. Mayer (supra) the intended victim had been thrown to the ground, her clothes were torn, her face scratched and her nose bleeding, while here the evidence shows at most a battery.

In People v. Lathrop, 197 Ill. 169, the Supreme Court held that the intent with which an assault was committed is a question of fact, and may be inferred from the character and circumstances of the assault. In People v. Mayer (supra) it was held that the question of intent is for the jury to determine.

In our opinion the circumstances of the assault form a sufficient basis for the jury's finding that the intent of the malefactor was to commit rape. It was dark, the parties were strangers, the assault was violent and ceased only when the prosecutrix screamed and Cameron intervened. The fact that the attack was interrupted prior to the victim's being thrown to the ground and her clothing torn does not

negate the presence of the specific felonious intent.

We have examined the opinions in People v. Cieslak (supra) and People v. Jenkins (supra) and find them clearly distinguishable on the facts. In Cieslak there was evidence that the parties knew each other, had been drinking and dancing, and defendant's conduct was at most "licentious conduct or violent familiarity". In Jenkins the court points out that the alleged assault took place on a public street, brightly lighted, with people likely to pass at any time, and there is no evidence of excessive violence.

The court wishes to express its thanks to appointed counsel for an excellent brief and oral argument.

For the reasons stated the judgment of the Circuit Court of Montgomery County is affirmed.

Judgment Affirmed.

Concur: George J. Moran

Concur: Edward C. Eberspacher

PUBLISH ABSTRACT ONLY